Docket No.: LOREAL 3.0-058 (PATENT)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Patent Application of:
Philippe Briand

Application No.: 10/645,771 Group Art Unit: 3754

Filed: August 21, 2003 Examiner: J. A. Kaufman

For: DISPENSER DEVICE

SUPPLEMENTAL APPEAL BRIEF

MS Appeal Brief - Patents
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Dear Sir:

Applicant hereby files this Supplemental Appeal Brief in response to the Notification of Non-Compliant Appeal Brief mailed April 3, 2006. Applicant appeals from the final rejection of claims 1-27 mailed June 13, 2005 ("Final Office Action").

REAL PARTY(IES) IN INTEREST

The real party in interest in the case is the assignee of record, L'Oreal, a corporation of France, having a place of business at 14, Rue Royale, Paris, France 75008. The assignment of the present application to L'Oreal was recorded in the United States Patent and Trademark Office on November 26, 2003, at Reel 014730, Frame 0141.

RELATED APPEALS AND INTERFERENCES

As indicated above, Applicant filed a Pre-Appeal Brief Request for Review on November 10, 2005. Applicant received a Notice of Panel Decision from Pre-Appeal Brief Review dated December 21, 2005, which indicated that the present application remains under appeal because there is at least one actual issue for appeal. As required by the Notice, Applicant submits the present Appeal Brief.

To the best of the current knowledge of Applicant, there are no related appeals or interferences pending before the United States Patent and Trademark Office.

STATUS OF CLAIMS

Claims 1-27 are pending in the present application. Claims 1-27 all stand rejected and all are being appealed. A clean copy of the claims is attached hereto as Appendix A.

STATUS OF AMENDMENTS

The most recent Amendment filed on April 28, 2005, has been entered and is reflected in the claims as attached hereto in Appendix A.

SUMMARY OF CLAIMED SUBJECT MATTER

The present invention, as set forth in claims 1-27, relates to devices for dispensing cosmetic and care substances and receptacles fitted with the devices.

In particular, as illustrated in the specification, from paragraphs [0042] - [0077], and the figures, independent claim 1 is directed to a receptacle containing a cosmetic or care substance including a dispenser comprising two parts. See, for example, Figures 1, 2, 4 and 5, where a device 20 comprises two parts 30,40. The first part has a first surface, and is attached to a receptacle. The second part has a second surface. See, for example, Figures 4, 5, 6 and 7, where a first part 30 has a first surface 60 or 60' and is attached to a receptacle 10, and a second part 40 has a second surface 80 or 80'. A dispenser opening orifice is formed between the first and second surfaces. The dispenser orifice opens out directly to the environment. See, for example, Figures 1 and 4-7, where a dispenser orifice 90 that connects the interior of the device 20 to the outside environment is formed between the end wall 37 of the first part 30 and the top wall 42 of the second part, and is defined by the gap between the first surface 60 or 60' of the end wall 37 and the second surface 80 or 80' of the top wall 42. In addition, and again as recited in claim 1, the second part is adapted for rotational mounting relative to the first part, in which the second part is capable of rotating between a dispensing position and a closed position. See, for example, Figures 4 and 5, where the second part 40 is positioned so as to be rotatable around the tubular extension 33 of the first part 30 from a dispensing position (shown in Figure 5) and a closed or non-dispensing position (shown in Figure 4). As described in the specification, in paragraphs [0069] - [0073], the dispensing position is capable of permitting a substance contained in the receptacle to exit or leave the device through the dispenser

orifice. The closed position is capable of preventing a substance contained in the receptacle from passing from the receptacle to the dispenser orifice.

The feature of a first part attached to a receptacle, as recited in claim 1, is exemplified in relief in Figures 4 and 5. Specifically, the first part 30, which is fixed on an oblong body 12 of the receptacle 10, includes a tubular outer skirt 31, transverse wall 32, tubular extension 33 and an assembly skirt 34. The tubular outer skirt 31 extends the outer surface of the receptacle 10. The transverse wall 32, which extends inwardly and generally perpendicularly from the tubular outer skirt 31, forms a top for the receptacle 10. The tubular extension 33 connects to the neck 11 of the receptacle 10 and to the transverse wall 32, such that tubular extension 33 is positioned on top of the neck 11 and inward from the transverse wall 32. Together, the tubular outer skirt 31, transverse wall 32 and assembly skirt 34 form a base connected to and surrounding the neck 11 and the lower end of the tubular extension 33 that is connected to the neck 11. The tubular extension 33 extends upwardly relative to the transverse wall 32, and includes an upper end wall 37, an annular bead 38, and a lateral opening 50.

As recited in claim 1, the second part is adapted for rotational mounting relative to the first part. In particular, the second part 40 surrounds the tubular extension 33 of the first part 30 and sits on top of aforementioned base. The second part 40 includes an outer skirt 41, a top wall 42, and an inner skirt 43. The outer skirt 41, which is connected to the top wall 42, has axial ribs (not shown in the drawings) formed on its radially inner surface (*i.e.*, the surface opposite the transverse wall 32) that cooperate with two thin splines 39 of the transverse wall 32 so as to create a hard point in the turning movement of the second part 40 and so as to make it easier to position the outer skirt 41 so that it extends the

outer skirt 31. The inner skirt 43 includes an annular rib 44 and a notch 45. The inner skirt is snap-fastened on the annular bead 38 of the tubular extension 33 via the annular rib 44. The notch 45 forms a chamber communicating with the lateral opening 50 when the second part is rotated into a dispensing position, as explained below.

As shown in Figures 1 and 4-7, the top wall 42 of the second part has an opening (which in the preferred embodiment is circular) into which the end wall 37 of the first part extends. A gap is thus formed between the two parts 30,40 at the top of the device 20 to form a dispenser orifice 90. Specifically, this gap or dispenser orifice 90 is formed between the end wall 37 of the tubular extension 33 and the top wall 42 of the second part 40. As depicted in Figure 6, the space j between the end all 37 and top wall 42 may be substantially constant, and the dispenser orifice 90 is defined by the gap between the facing surfaces 60 and 80 of the end wall 37 and top wall 42 respectively. Alternatively, as depicted in Figure 7, the space between the end all 37 and top wall 42 may also not be substantially constant, and the dispenser orifice (denoted by 90' instead of 90) is instead defined by the gap between the facing surfaces 60' and 80 of the end wall 37 and top wall 42 respectively. As shown in Figure 1, the dispenser orifice 90 is annular, surrounded on the outside by the cylindrical wall 80 defining the opening in the top wall 42 of the second part 40 and on the inside by the cylindrical wall 60 provided by the tubular extension 33 of the first part 30. As illustrated in Figures 1, 4, and 5, the dispenser orifice 90 connects a setback 52 in the device 20 and the outside or environment. Thus, together, the end wall 37 of the tubular extension 33 and the top wall 42 of the second part 40 form a dispenser orifice 90 that opens out directly to the outside or the environment, as described in claim 1.

The basic functional aspects of the device 20 are described in paragraphs [0069]-[0075] of the specification. As described, and again as recited in claim 1, the second part 40 is capable of being rotated between a closed position and a dispensing position. As shown in Figure 4, in a closed position, the lateral opening 50 in the first part 30 is closed by the inner skirt 43 of the second part 40. By rotating the second part 40 relative to the first part 30, the device 20 may be brought into a dispensing position. The dispensing position brings the notch 45 of the inner skirt 43 into register with a setback 52, which allows a substance to flow from the lateral opening 50 towards the dispenser orifice 90. In this manner, a substance may be distributed from the receptacle 10 (through its neck 11) into the tubular extension 33, from the tubular extension (through the its lateral opening 50) into the notch 45, from the notch 45 into the setback 52, and from the setback 45 through the annular dispenser orifice 90 to the outside or environment.

Independent claims 17, 18 and 19, which are directed to devices of the present invention, contain similar recitations as claim 1, but also include additional features.

For example, in claim 17, in addition to the first and second surfaces, the first and second parts further comprise first and second portions. Moreover, the first and second portions comprise first and second outer surfaces, in which one of the first and second outer surfaces is the continuation of the other of first and second outer surfaces. This feature is exemplified in Figures 1, 4, and 5, which together, show that the end wall 37 and the top wall 42 have respective top surfaces 37b and 42b that extend each other, such that the top surfaces 37b and 42b are continuations of one another, with only the gap formed by the dispenser orifice 90 between them.

As for claim 18, it adds the feature of one of the first and second surfaces being rotatable around the other of

the first and second surfaces. As shown in Figures 6 and 7, the the dispenser orifice 90 is defined between two facing surfaces 60' and 80' that belong respectively to the first and second parts 30, 40. As explained earlier, the second part 40 is rotatable around the first part 30. As the second part 40 rotates around the first part, the two facing surfaces 60 or 60' and 80 or 80' rotate around each other.

In the device recited in independent claim 19, instead of just having a first surface, the first part includes a front surface and an axis of rotation. Also, the receptacle to which the first part is attached has a longitudinal axis. In addition, the second part is adapted for rotational mounting relative to the axis of rotation, in which the second part is capable of rotating between a dispensing position and a closed position. Further, the axis of rotation is sloped relative to the longitudinal axis. For example, as shown in Figures 3 and 4, the receptacle 10 has a longitudinal axis (z) and the first part 30 has an axis of rotation (x), in which the axis of rotation is sloped relative to the longitudinal axis (z).

GROUNDS OF REJECTION TO BE REVIEWED ON APPEAL

I. Whether claims 20-27, added in the Amendment dated April 28, 2005, and rejected under 35 U.S.C. § 112, first paragraph, for lack of written description, include new matter.

II. Whether claims 1, 2, 4-11, 13, 14, and 16-27 are unpatentable under 35 U.S.C. § 102(b) as being anticipated by U.S. Patent No. 5,358,146 (Stull).

III. Whether claims 3, 12, and 15 are unpatentable under 35 U.S.C. § 103(a) as being obvious over U.S. Patent No. 5,358,146 (Stull).

ARGUMENT

A. There Is Clear Written Description Support For The Subject Matter In Claims 20-27

In the Final Office Action, claims 20 to 27 were rejected under 35 U.S.C. § 112, first paragraph, for lack of written description. As shown on page 2 of the Official Action dated June 13, 2005, the Examiner asserted that there is no support for the "fixed position" of the dispenser orifice limitation and the "surface" being in communication with an environment upon which the material is dispersed limitation in claims 20-27. This rejection is erroneous because there is clear written description support in the specification for these features.

Regarding the feature of a "fixed position" for the dispenser orifice independent of the second part, as recited in claims 20, 22, 24, and 26, support for this feature is provided in paragraph [0023] of the specification. As disclosed in paragraph [0023],

> [t]he dispenser orifice may be permanently formed between the surfaces belonging respectively to the first and second parts, regardless of whether the dispenser device is in the dispensing position or the closed position.

Additionally, as explained in paragraph [0021], the second part 40 may be turned relative to the first part 30 to switch from the closed position to the dispensing position. Thus, as is apparent from the specification and drawings, the dispenser orifice 90 may be permanently formed, such that its position (*i.e.*, between the surfaces of the first and second parts 30,40) is fixed regardless of the orientation or turning of the second part 40. Thus, there is clear written description support for the feature of a "fixed position" for the dispenser orifice independent of the second part, as recited in claims 20, 22, 24, and 26.

Regarding the feature of a surface in communication with the environment upon which the substance is dispersed upon dispensing from the dispenser orifice, as recited in claims 21, 23, 25, and 27, support for this feature is provided in paragraphs [0011], [0012], and [0024], collectively. As explained in paragraph [0024], a "substance contained in the receptacle can leave the device through a dispenser orifice opening out directly to the outside." Additionally, according to paragraphs [0011] and [0012], the device of the present invention may comprise a top wall 42 and an end wall 37 that "present outside surfaces," whose edges define the two surfaces between which the dispenser orifice is formed. Thus, the device of the present invention may include one or more surfaces (*i.e.*, the outside surfaces of the end wall and the top wall 37b,42b), that are in communication with the outside. The outer surfaces of the end wall and top wall thus comprise an environment upon which the substance may be dispersed upon dispensing from the dispenser orifice. For instance, in paragraph [0015], the specification explains:

> The substance leaving the dispenser orifice may tend to flow under gravity downwards over the top wall of the second part if that substance is sufficiently fluid. The fact of having the dispenser orifice off-center can make it possible to increase the size of the surface onto which the substance can flow before leaving the top wall, thus making it easier to take the substance.

Thus, there is also clear written description support for the feature of a surface being in communication with the environment upon which the substance is dispersed upon dispensing from the dispenser orifice, as recited in claims 21, 23, 25, and 27.

Accordingly, with written description support for both of the foregoing features, claims 21-27 clearly do not include any

new matter, and the rejection of claims 20-27 under 35 U.S.C. § 112, first paragraph, should be withdrawn.

B. Claims 1, 2, 4-11, 13, 14 And 16-27 Are Not Anticipated By Stull

In the Official Action of June 13, 2005, claims 1, 2, 4-11, 13, 14 and 16-27 were rejected under 35 U.S.C. 102(b) as allegedly being anticipated by U.S. Patent No. 5,358,146 (Stull).

As described in the above Summary Of Claimed Subject Matter, according to independent claims 1 and 17-19, the present invention is directed to receptacles and devices containing a cosmetic or care substance including a dispenser comprising two parts, namely a first part and a second part. One common feature of the receptacles and devices described in independent claims 1 and 17-19 is that they all include a "dispenser orifice," which opens out directly to the environment. Moreover, the dispenser orifice is recited as formed between the first part and the second part, or between surfaces of the first part and the second part.

As described in paragraphs [0007] and [0016], the size and shape of the dispenser orifice may be adjusted without the requirement of extra parts. Therefore, a dispensing device with such a feature could be made to leave a sufficiently narrow clearance for the dispenser orifice, for instance to prevent sand from penetrating the inside of the device, at a lower cost than those dispenser devices that utilize or require extra parts, such as check valves or elastomers, to keep out sand.

Additionally, such a feature allows the placement of the dispenser orifice in different locations on the top of the device. As explained in paragraph [0014],

> [t]he dispenser orifice may be located away from the center of the top wall of the second part, for example in order to allow the second part to turn about a pivot axis

that is inclined and/or in order to benefit from a larger area on which the substance can accumulate prior to being taken by the user.

1. Stull Does Not Disclose A Dispenser Orifice Of The Present Invention

In contrast to the present invention, Stull does not disclose at least the feature of a dispenser orifice formed between two parts, or surfaces of two parts of a receptacle or device.

Referring to Figure 1, Stull discloses a hand-held dispenser having a captive closure cap 24. As shown in Figures 7 and 8 and described in column 4, line 55, to column 5, line 5, the cap 24 has an outer skirt 32 that encloses an inner cylindrical valving portion 34 and a bottle neck portion 22. The inner cylindrical valving portion 34 includes a liquid discharge recess 36. The bottle neck portion 22 includes a discharge passage 30. There is a discharge orifice 38 in the cap 24. The cap 24 may be rotated to cause the alignment of the discharge passage 30, discharge recess 36 and the discharge orifice 38. Under this alignment, Stull's contents are allowed to flow first from the bottle neck 22 to the discharge recess 36, then from the discharge recess 36 to the discharge passage 30, next from the discharge passage 30 to the discharge orifice 38, and finally from the discharge orifice 38 to the outside.

First, Stull is silent as to the dispenser orifice being formed between two parts that opens out directly to the outside. Although Stull discloses a discharge orifice 38, it is formed as part of the cap 24, and not between two parts or the surfaces of two parts. As described in column 5, lines 1 to 3, rather than being formed between two parts or the surfaces of two parts, the discharge orifice 38 instead is formed as a part of the upper transverse wall 40 of the cap part 24.

In the Official Action dated June 13, 2005, the Examiner appears to equate passages 30 and 36 with the dispenser orifice of the present invention. While Stull discloses rotatable cylindrical parts with surfaces that provide communication, these surfaces do not form a dispenser orifice as claimed in the present invention.

First, combined passages 30 and 36, even when aligned, do not define an orifice per se, in that their alignment does not produce an opening nor do they function as an opening. Instead, as described in column 3, lines 46 to 54, they are a part of an internal valving means that establishes communication between the discharge orifice 38 and the interior of the container. In contrast, the dispenser orifice of the present invention establishes communication between the inside of the device and the outside. The mere fact that Stull actually calls another part an orifice (*i.e.*, the discharge orifice), instead of combined passages 30 and 36, supports the notion that the combined passages are not, in fact, an orifice, or at least not one that one of ordinary skill in the art would consider an orifice.

Moreover, the dispenser orifice of the present invention is physically different than Stull's passages 30 and 36. As shown in Figures 1, 4,and 5 of the present application, the dispenser orifice of the present invention is formed at the top of the device, as an annular gap between the first part and second part. In essence, the second part surrounds the tubular extension of the first part, which forms the gap of the dispenser orifice in-between the two parts. In this manner, the dispenser orifice continuously occupies a space between the first and second parts. Accordingly, as depicted in the top view of Figure 1, the dispenser orifice is annular in nature. As for Stull, passages 30 and 36 are mere grooves or recesses in two parts. Therefore, they do not have an annular appearance.

In fact, the only time passages 30 and 36 create a space is when they are aligned, as opposed to the dispenser orifice of the present invention in which the gap or space is permanently formed and does not require any additional manipulations, such as alignments.

The features of the dispenser orifice of the present invention have practical implications as well, and result in certain advantages of the present invention over Stull. First, because the dispenser orifice of the present invention must open "directly" to the environment and also be formed between two parts or surfaces of two parts, the size and shape of the dispenser orifice may be adjusted to prevent sand and unwanted particles from entering a receptacle or device of the present invention without utilizing extra parts. In Stull, no mention is made of varying the size and shape of passages 30 and 36 for such a purpose. In fact, Stull is silent as to any feature that prevents outside particles, such as sand, from entering its dispenser. Arguably, the only parts in Stull that prevent entry of unwanted particles is its cap 24, and even this is only possible if the cap 24 is turned to a closed position so that the discharge orifice 38 is not aligned with passage 30. Indeed, one distinct advantage of the present invention is that the prevention of the entry of unwanted particles can be achieved without utilization of extra parts, such as a cap.

Additionally, as previously mentioned, the dispenser orifice in accordance with the present invention does not require the alignment of the two parts it is formed between in order to dispense the contents of the dispenser. In contrast, Stull not only requires the alignment of passages 30 and 36, but also the alignment of the discharge orifice 38 with passage 30 as well in order to discharge its contents. Accordingly, unlike Stull, one other advantage of the present invention is that the dispenser orifice of the present invention opens out directly to

the environment regardless of whether the receptacle or device is in a closed or dispensing position.

Therefore, as explained above, Stull does not disclose the dispenser orifice of the present invention. Moreover, Stull is also silent as to the aforementioned advantages of the present invention's dispenser orifice.

2. Even If Considered An Orifice As Defined, Stull's Passages Nonetheless Do Not Open "Directly" To The Environment

To the extent that Stull's passages 30 and 36 may be considered a dispenser orifice, they nonetheless still do not open "directly" to the environment, and therefore, do not disclose the recited feature of a dispenser orifice that opens out directly to the environment.

On page 4 of the Official Action of June 13, 2005, the Examiner asserted: "Applicant contends that the two parts of Stull do not create an orifice that opens out to the environment. Clearly, 30 and 36 open to the environment when aligned with 38, and therefore, the claimed limitations are met."

The Examiner's conclusion that Stull's passages 30 and 36 open out directly to the outside or environment is clearly erroneous. When all of passages 30 and 36 and the discharge orifice 38 are aligned, the contents of the dispenser must pass through passage 36 first, then through passage 30, and finally through the discharge orifice 38 to reach the outside. In column 6, lines 29 to 35, Stull explains "[w]hen the cap 24 is turned counterclockwise or in an unscrewing direction as viewed from the top, it will cause passages 30 and 36 to become aligned, enabling discharge of the contents of the bottle through the orifice 38." In Stull, the contents of the dispenser must pass through the discharge orifice 38 in order to

be discharged or to reach the environment. Thus, Stull's passages 30 and 36 do not open out directly to the environment.

Arguably, the recesses 30 and 36 do not "open out" to anything at all and are instead, merely in communication with the discharge orifice 38; and even then, only passage 30 communicates directly with the discharge orifice 38. As recited above, the contents of Stull's dispenser must pass through passage 36 first, then through passage 30, and finally through the discharge orifice 38. Stull's own disclosure would appear to support this line of reasoning. In column 3, lines 45-54, Stull explains:

> The cap has a discharge orifice, and a stopper plug extending into the container neck. Cooperable valving means are provided on the stopper plug and on the neck of the container, for establishing communication between the discharge orifice of the cap and the interior of the container when the cap is turned toward a first position on the container neck, and for blocking communication between the discharge orifice of the cap and the interior of the container when the cap is turned toward a second position on the container neck. (emphasis added).

As described above, the cooperable valving means (*i.e.*, passages 30 and 36) are at most in communication with the discharge orifice 38, and do not communicate directly to the outside or environment.

As evident in his conclusive comments from page 4 of the Official Action of June 13, 2005, the Examiner only considered whether Stull's passages 30 and 36 open to the environment, and not whether they open directly to the environment. Applicant submits that the Examiner's oversight of the requirement for the dispenser orifice to open directly to the environment, as recited in the claims, is proscribed. As explained in *Glaxo, Inc. v. Novopharm, Ltd.*, 110 F.3d 1562 (Fed. Cir. 1997), "It is elementary patent law that all limitations are material." Indeed, in citing to *In re Wilson*, 424 F.2d 1382, 1385 (C.C.P.A.

1970), M.P.E.P. § 2143.03 goes one step further in mandating "[a]ll words in a claim must be considered in judging the patentability of that claim against the prior art." Accordingly, the Patent and Trademark Office must consider whether Stull's passages 30 and 36 open directly to the environment and not whether they just open to the environment. As shown above, passages 30 and 36 cannot possibly open directly to the environment. At most, they are merely in communication with the discharge orifice 38.

Arguably, only the discharge orifice 38 opens directly to the environment, and it is formed as part of a cap 24, and not between two parts or surfaces of two parts as recited in the independent claims 1, and 17-19.

Therefore, for the above reasons, claims 1, 2, 4-11, 13, 14, and 16-27 are not anticipated by Stull.

C. Claims 3, 12, and 15 Are Not Obvious Over Stull

The Examiner also rejected claims 3, 12, and 15 under 35 U.S.C. § 103(a) as being unpatentable over Stull. In response, initially, Applicant notes that claims 3, 12, and 15 are patentable, *inter alia*, by virtue of their ultimate dependence from claim 1, which is patentable for the reasons set forth above.

In addition, Applicant wishes to address the Examiner's assertions regarding these claims that were set forth on pages 3 and 4 in the Official Action dated June 13, 2005. Prior to a discussion on the merits of the assertions, Applicant wishes to briefly summarize the subject matter of these claims. Claim 3 is directed to a receptacle of the present invention, with all the limitations of claims 1 and 2, in which the distance between the first and second surfaces is specified as less than 0.5 mm. Claim 12 is directed to a receptacle of the present invention, with all the limitations of claim 1, in which the first and second parts are configured so as to pass from a closed position

to a dispensing position by rotating the second part through a half turn. Claims 15 is directed at a receptacle of the present invention, with all the limitations of claim 1, in which the first and second parts are made of plastic material of different colors.

With regards to claim 3, the Examiner asserted "[i]t would have been obvious to make spacing between the surfaces less than .5 mm in order to allow for rotation of the parts relative to each other while not permitting product to get between." Applicant disagrees with this assertion. Specifically, as mentioned above, Stull makes no mention of any mechanism for preventing entry of unwanted particles, such as sand at all, let alone for any "dispenser orifice" formed between the surfaces of two parts. Assuming the Examiner is making reference to passages 30 and 36 as equivalent to the present invention's "dispenser orifice," Stull still makes no mention of varying the distance between or within these passages 30 and 36. Indeed, Stull's utilization of a cap 24 that covers passages 30 and 36 suggests that the prevention of unwanted particles is not a function of these passages 30,36, and that the feature of a narrow gap, such as less than 0.5 mm, between or within the passages, is unnecessary.

With regards to claim 12, Stull's mechanism for rotating the cap 24 for dispensing its contents is elaborate, with the use of stops and detent structures 42,43. Moreover, the complicated mechanism requires the alignment of both passage 30 and passage 36, as well as the discharge orifice 38. The procedure is outlined in column 5, line 1 to column 6, line 49, of Stull. However, as described in column 6, lines 34-49, Stull only mentions a displacement of approximately 90 degrees from an open (*i.e.*, discharge) position to a closed position, with partial discharge positions in-between. Due to the requirements for such a complicated mechanism, Applicant submits that if the

limitation of a half turn (*i.e.*, approximately 180 degree displacement) from an open to a closed position was envisioned by Stull, it would have made mention of such a possibility. However, Stull not only makes no mention of a half turn rotation for dispensing its contents, but makes no mention of any displacement of more than 90 degrees at all.

With regards to claim 15, the first and second parts may be molded out of plastics having different colors. As explained on page 3, lines 3-6 of the specification, the utilization of plastics with different colors allows for easier identification of the location of the dispenser orifice by a user. However, if the Examiner is equating passages 30 and 36 with the dispenser orifice of the present invention, then, the Examiner's assertion, on page 4 of the Final Office Action, that "the different colored plastics would have been obvious as aesthetic considerations are important in marketing a product" is simply wrong. First, Stull utilizes a cap 24, which covers the interior of its dispenser including passages 30 and 36. Thus, there would be no reason to alter the passages 30,36 for aesthetic reasons because they are never seen by the user. Additionally, unlike the previously mentioned use of different colors to help a user locate the dispenser orifice, in Stull's dispenser, there is no reason for a user to locate passages 30 and 36. In particular, a user can only see the contents of Stull's dispenser when they leave the dispenser into the environment or outside of the dispenser. This only occurs when the contents leave Stull's discharge orifice 38, and not when the contents leave the passages 30 and 36. So, unlike the present invention's dispenser orifice, there is no need for a user to locate Stull's passages 30 and 36. Arguably, a color scheme might be more useful for portions of Stull's dispenser that are visible from the outside rather than interior portions. However, use of different colors for passages 30 and 36, would

not make sense, which undoubtedly is an explanation for Stull's silence regarding such a feature.

Therefore, for at least the reasons set forth above, claims 3, 12, and 15 are not obvious over Stull.

CONCLUSION

For the reasons set forth above, the Examiner's rejection of claims 20-27 under 35 U.S.C. § 112, first paragraph, claims 1, 2, 4-11, 13, 14, and 16-27 under 35 U.S.C. § 102(b), and claims 3, 12, and 15 under 35 U.S.C. § 103(a) must be withdrawn and the claims allowed.[1]

Dated: May 2, 2006

Respectfully submitted,

By _____

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[1] Applicant notes that claim 19 remains rejected under 35 U.S.C. § 112, second paragraph, but may be easily attended to with a simple amendment to replace the phrase "dispenser opening" with the phrase "dispenser orifice" in the claim.

APPENDIX A - CLAIMS

A copy of the claims on appeal is set forth below.

1. A receptacle containing a cosmetic or care substance including a dispenser comprising:

a first part having a first surface, said first part being attached to the receptacle; and

a second part having a second surface, whereby a dispenser orifice is formed between said first and second surfaces, said second part adapted for rotational mounting relative to said first part, said second part capable of rotating between a dispensing position and a closed position, said dispensing position capable of permitting a substance contained in the receptacle to exit through said dispenser orifice, said dispenser orifice opening out directly to the environment, and said closed position capable of preventing a substance contained in the receptacle from passing from the receptacle to said dispenser orifice.

2. A receptacle according to claim 1, wherein said first and second surfaces are spaced apart by a distance, said distance being sufficiently small to prevent sand from penetrating into an interior of the receptacle.

3. A receptacle according to claim 2, wherein said distance between first and second surfaces is less than 0.5 mm.

4. A receptacle according to claim 1, wherein said dispenser orifice is defined at least in part by a gap, said gap being in the form of an annular sector.

5. A receptacle according to claim 1, wherein said second part comprises a top wall, said top wall being provided with an opening, said opening comprising an edge, said edge defining one of said first and second surfaces, and wherein said first part comprises an end wall, said end wall engaged with said opening

in said second part, said end wall comprising an edge, said edge defining the other one of said first and second surfaces.

6. A receptacle according to claim 5, wherein said dispenser orifice is eccentric in said top wall.

7. A receptacle according to claim 1, wherein said first and second surfaces are concentric and circular in section.

8. A receptacle according to claim 1, wherein said first part comprises a tubular extension, said tubular extension including a closed top end and provided with at least one lateral opening, and wherein said second part comprises an inner skirt, said inner skirt configured to close said lateral opening when said first and second parts are in said closed position, said inner skirt also configured to allow substance to pass from said lateral opening to said dispenser orifice when said first and second parts are in said dispensing position.

9. A receptacle according to claim 1, including a chamber formed between said first and second parts when the receptacle is in said dispensing position, said dispenser orifice communicating with said chamber.

10. A receptacle according to claim 9, wherein said second part includes an axis of rotation, and said chamber extends over an angular sector about said axis of rotation, said angular sector being less than one complete revolution of said second part.

11. A receptacle according to claim 1, wherein said second part includes a pivot axis, and said receptacle includes a neck including an axis, and wherein said pivot axis is located at a point on said second part and is inclined relative to said axis of said neck.

12. A receptacle according to claim 1, wherein said first and second parts are configured so as to pass from said closed position to said dispensing position by rotating said second part through a half turn.

13. A receptacle according to claim 1, wherein said first and second parts are configured to be prevented from moving axially relative to each other.

14. A receptacle according to claim 1, wherein the receptacle does not include a check valve.

15. A receptacle according to claim 1, wherein said first and second parts are made of plastic material of different colors.

16. A receptacle according to claim 1, wherein said substance is a sunscreen or an after-sun lotion.

17. A device comprising:

a first part having a first surface, said first part for attaching to a receptacle; and

a second part having a second surface, whereby a dispenser orifice is formed between said first and second surfaces, said second part adapted for rotational movement relative to said first part, said second part capable of rotating between a dispensing position and a closed position, said dispensing position capable of permitting a substance contained in said receptacle to leave the device through said dispenser orifice, said dispenser orifice opening out directly to the environment, and said closed position capable of preventing said substance contained in the receptacle from passing from said receptacle to said dispenser orifice, said first and second parts further comprising first and second portions, said first and second portions comprising first and second outer surfaces, one of said first and second outer surfaces being the continuation of the other of said first and second outer surfaces.

18. A device containing a cosmetic or care substance including a dispenser comprising:

a first part having a first surface, said first part adapted for attachment to a receptacle; and

a second part including a second surface, whereby a dispenser orifice is formed between said first and second parts, said second part adapted for rotational mounting relative to said first part, said second part capable of rotating between a dispensing position and a closed position, said dispensing position capable of permitting a substance contained in the receptacle to leave the receptacle through said dispenser orifice, said dispenser orifice opening out directly to the environment; and

said closed position preventing said substance contained in the receptacle from passing from the receptacle to said dispenser orifice,

one of said first and second surfaces being rotatable around the other of said first and second surfaces.

19. A device containing a cosmetic or care substance including a dispenser comprising:

a first part including a front surface and an axis of rotation, said first part being attached to a receptacle having a longitudinal axis; and

a second part including a second surface, whereby a dispenser opening is formed between said first and second surfaces, said second part adapted for rotational mounting relative to said axis of rotation, said second part capable of rotating between a dispensing position and a closed position, said dispensing position capable of permitting a substance contained in the receptacle to leave the device through said dispenser orifice, said dispenser orifice opening out directly to the environment,

said closed position capable of preventing said substance contained in the receptacle from passing from the receptacle to said dispenser orifice,

said axis of rotation being sloped relative to said longitudinal axis.

20. A receptacle according to Claim 1, wherein said dispenser orifice is in a fixed position independent from said second part.

21. A receptacle according to Claim 1, wherein said receptacle further comprises a surface being in communication with said environment upon which said substance is dispersed upon dispensing from said dispenser orifice.

22. A device according to Claim 17, wherein said dispenser orifice is in a fixed position independent from said second part.

23. A device according to Claim 17, wherein said device further comprises a surface being in communication with said environment upon which said substance is dispersed upon dispensing from said dispenser orifice.

24. A device according to Claim 18, wherein said dispenser orifice is in a fixed position independent from said second part.

25. A device according to Claim 18, wherein said device further comprises a surface being in communication with said environment upon which said substance is dispersed upon dispensing from said dispenser orifice.

26. A device according to Claim 19, wherein said dispenser orifice is in a fixed position independent from said second part.

27. A device according to Claim 19, wherein said device further comprises a surface being in communication with said environment upon which said substance is dispersed upon dispensing from said dispenser orifice.

APPENDIX B - EVIDENCE

Appellant has not submitted any evidence with this Appeal Brief.

APPENDIX C - RELATED PROCEEDINGS

Appellant is not aware of any related proceedings.